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No. 320

In the Supreme Court of the United States

OCTOBER TERM, 1941

SOUTHERN STEAMSHIP COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 769–785) [1] are reported in 120 F. (2d) 505. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 14–44) are reported in 23 N. L. R. B., No. 2.

[1] Pursuant to stipulation of the parties (R. 790–791), the printed record herein for purposes of the petition for a writ of certiorari consists of the appendix to the brief of petitioner, filed in the court below, and the proceedings before the United States Circuit Court of Appeals for the Third Circuit.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 786-789) was entered on May 20, 1941. The petition for a writ of certiorari was filed on July 30, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether under the National Labor Relations Act seamen may be discharged for having engaged in a peaceful strike on board a vessel on which they worked and which was safely moored in a domestic port but not the home port.

2. Whether there is substantial evidence to support the Board's finding that the signing off of shipping articles did not terminate the tenure of employment of petitioner's seamen.

3. Whether the Board abused its discretion in refusing to permit the presence of representatives of the employer at an election held under Section 9 of the National Labor Relations Act to determine collective bargaining representatives.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

In proceedings under Section 9 of the Act in which petitioner, the National Maritime Union of America (herein called the Union), and the International Seamen's Union of America participated, the Board on July 16, 1937, issued its Decision and Direction of Election (R. 19, 671). Pursuant thereto, an election to determine collective bargaining representatives was conducted by the Board's Regional Director. On January 3, 1938, the Regional Director issued a report finding that the results of the election showed that a majority of the eligible employees had voted for the Union (R. 759–761). Petitioner filed objections to the election and to the Regional Director's report on the ballot; the objections were grounded on the refusal to permit the presence of company representatives at the balloting on one of the vessels (R. 76–78, 762–764). On January 26, 1938, the Board dismissed petitioner's objections and certified the Union as exclusive representative of petitioner's employees within the appropriate unit (R. 671–674).

Susequently, upon charges filed by the Union alleging that petitioner had engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act, and following a hearing and other usual proceedings under Section 10 of the Act, the Board on April 22, 1940, issued its findings of fact, conclusions of law, and order (R. 14–44). So far as here material, the facts,

as found by the Board and as shown by the evidence, may be summarized as follows:[2]

Following the certification on January 26, 1938, of the Union as exclusive bargaining representative, the Union repeatedly requested petitioner to hold a collective bargaining conference with it; petitioner did not accede to any of these requests and did not even reply to most of them (R. 21–22; R. 92–99, 108–112, 589–592). The Board found that on or about January 26, 1938, and at all times thereafter petitioner thereby refused to bargain collectively in violation of Section 8 (5) and (1) of the Act (R. 22, 40).

Primarily because of petitioner's unlawful refusal to bargain with the Union, 13 unlicensed seamen of the *City of Fort Worth,* who were members of the Union, struck on board that vessel on July 18, 1938, while she was moored to the dock at Houston, Texas, during the course of a coastal voyage (R. 22–25, 28–29; R. 128–131, 179–181, 431–433, 593–596). At 8 a. m. the strikers failed to turn on steam for loading cargo (R. 23; R. 182, 351–356). They withdrew to the poop deck, which serves as the general meeting place of the seamen when off duty, and rejected the requests and orders of the officers and a deputy United States Shipping Commissioner to abandon the strike (R. 23–24; R. 138–140, 165–169, 209–210,

[2] In the following statement the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

219–220, 269–274, 356, 369, 380–383, 431–440, 500). They maintained sufficient steam, however, for the operation of the ship's sanitary and safety appliances and remained seated on the poop deck without attempting to interfere with the normal shipboard operations performed by the officers and nonstriking crew members (R. 23–25, 29; R. 130–131, 135–137, 182, 241–242, 290–293, 323, 375, 387–388, 404, 499–502, 595, 596). The strikers were not at any time ordered to leave the ship (R. 24, 30; R. 404, 513). At 7 p. m. the same day, after petitioner's local attorney promised that petitioner would meet with the Union in an effort to negotiate an agreement, the strikers resumed their stations and the ship sailed on schedule (R. 24–25; R. 142–149, 274–275, 292–293, 450–453, 483, 620–621).

On July 25, at the end of the voyage and upon the signing off of shipping articles at the home port of Philadelphia, petitioner refused to reship five of the seamen because of their participation in the strike (R. 26, 32–37; R. 151–155, 185–186, 195, 201–202, 223–225, 284, 289–290, 298, 338, 391, 394, 493–494, 520–521, 533–534). Seven other seamen consequently struck and left the ship in protest against petitioner's discriminatory action (R. 26, 38–39; R. 156–157, 202, 226, 244–245, 248–249, 255–256). The

[3] The captain and ship's officers did not regard the strikers as having taken possession of the ship (R. 29–30; R. 404, 499–500).

Board found that the five seamen were discharged in violation of Section 8 (3) and (1) of the Act, and that the strikes of July 18 and 25, 1938, were caused by petitioner's unfair labor practices (R. 25, 26, 32–39).

The Board's order required petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union upon request, to offer reinstatement with back pay to the five seamen against whom petitioner had discriminated, to offer reinstatement upon application to the seamen who went on strike on July 25, and to post appropriate notices (R. 40–44).

Thereafter, petitioner filed in the court below its petition to review and set aside the Board's order (R. 1–13); the Board requested enforcement (R. 45–52). The case was argued on October 8, 1940, before three judges (R. 767–768); on February 7, 1941, the case was restored to the argument list for rehearing before the court *en banc* (R. 768). The case was heard and decided by the court *en banc* (R. 768–769).[4] On May 6, 1941, the court below

[4] The question whether a circuit court of appeals may be composed of all the circuit judges in active service, sitting *en banc*, is now before this Court in *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, No. 34, this Term, certiorari granted, March 31, 1941. It has also been raised in *Oughton* v. *National Labor Relations Board*, No. 98, this Term, petition for writ of certiorari filed May 22, 1941, and *Newark Morning Ledger Co.* v. *National Labor Relations Board*, No. 307, this Term, petition for certiorari filed July 24, 1941. Petitioner in the instant case does not raise the question.

handed down its opinion directing enforcement of the Board's order with a modification not here material (R. 769–780). The court's decree was entered on May 20, 1941 (R. 786–789).

ARGUMENT

1. Petitioner contends (Pet. 2, 7–8, 11–18) that seamen who engage in a peaceful strike on board a vessel moored in a safe domestic harbor are guilty of revolt and mutiny, and therefore forfeit their rights to the protection of the National Labor Relations Act against discharge for concerted union activity. Neither logic nor law supports this contention. As the court below held (R. 774–780), and as students of the subject have recognized (Rothschild, *The Legal Implications of a Strike by Seamen,* 45 Yale L. J. 1181; Sapiro and Frank, *Mutiny at the Dock,* 25 Calif. L. Rev. 41), modern industrial conditions require that seamen, no less than workers on land, have the right in port to withhold their collective services in order to achieve their economic demands or, as here, in order to enforce the right of collective bargaining unlawfully denied them by their employer. Without reference to the wisdom of the policy suggested by the petitioner, it is clear that the Act does not provide for the exception which petitioner now urges. On the contrary, Congress, by the terms of the Act, has broadly guaranteed the right to "any employee" "to engage in concerted activities, for the purpose of collective bargaining or other

mutual aid or protection" (Sections 2 (3), 7, 8 (1)).[5]

Even apart from the clear terms of the Act, it is plain that seamen in a harbor of safety neither are denied the right to strike nor are they guilty of revolt or mutiny if they withhold their services. *Weisthoff* v. *American-Hawaiian S. S. Co.*, 79 F. (2d) 124 (C. C. A. 2), certiorari denied, 296 U. S. 619; *Black Diamond Steamship Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), certiorari denied, 304 U. S. 579; *The Blake*, W. Rob. 73, 166 Eng. Rep. 500, 506; *The South Portland*, 111 Fed. 767 (D. Wash. N. D.); *Buddington* v. *Smith*, 13 Conn. 333. None of the cases cited by petitioner (Pet. 14–18) is to the contrary. In *Rees* v. *United States*, 95 F. (2d) 784 (C. C. A. 4), the court expressly pointed out that the question whether "the crew of a vessel which is moored to a dock or is at anchor in a safe harbor have the right to strike * * * is not presented for decision in this case" (95 F. (2d) at 792). In *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653, it was not the act of striking which afforded lawful ground

[5] The only workers excluded from the category of "employee" are "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse" (Section 2 (3)). In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, this Court upheld the application to seamen of the protective guarantees of the Act.

for discharge, but since the strikers unlawfully took possession of the vessel, committed sabotage, and threatened to renew such unlawful acts, the discharges were regarded by the court as "a necessary measure for the safety of the ships" (98 F. (2d) at 414–415).[6] Similarly, in both *The Losmar,* 20 F. Supp. 887 (D. Md.), and *The Oakmar,* 20 F. Supp. 650 (D. Md.), the strikers had refused to leave the vessel when ordered to do so by the master and consequently were found by the court to be trespassers.[7] At most, in the instant case the strikers were merely ordered to abandon the strike, not to leave the ship (R. 24, 30).

Petitioner's further contention (Pet. 8, 12–13, 18) that the strike was an unlawful "sit-down" strike and the discharge of the strikers therefore justified under the doctrine of *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, is also without merit. The concurrent findings of the Board (R. 23-24, 25, 29–30) and of

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[6] Petitioner suggests that although no damage to the ship was occasioned by the strike, the ship's safety was imperiled because "serious consequences might have resulted" (Pet. 13). But the Board (R. 23, 25) and the court below (R. 775) expressly found that sufficient steam had been maintained to operate the ship's sanitary and safety devices and that the ship was admittedly not in danger at any time. Petitioner does not attack these findings as without substantial supporting evidence.

[7] Wholly inapposite is *Texas Co.* v. *National Labor Relations Board,* 120 F. (2d) 186 (C. C. A. 9) in which the court held merely that to reinstate an habitual drunkard as boatswain would not effectuate the policies of the Act (p. 190).

the lower court (R. 774) establish that the strikers did not engage in violence or other unlawful conduct and did not take or hold possession of the ship against the authority of their employer; on the contrary they simply remained seated on the poop deck, their usual place to meet when off duty, and were at no time ordered to leave the ship which was their home. The quantitative and qualitative differences between the employee conduct in the *Fansteel* case and the conduct involved here are apparent. In similar circumstances, the *Fansteel* rule has been held inapplicable. *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68 (C. C. A. 2) modified and affirmed 309 U. S. 629.*

2. Petitioner urges (Pet. 3, 7, 8, 19–20) that the Board's finding that the tenure of employment of petitioner's seamen did not terminate by the signing off of shipping articles (R. 27–28) is not supported by substantial evidence. The court below sustained the finding (R. 773–774). The evidence amply sustains the concurrent holdings of the

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* See also *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 888 (C. C. A. 1), certiorari denied, No. 1052, October 1940, Term; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 479 (C. C. A. 3), certiorari denied on this point, 309 U. S. 684; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); Note, *Employee Misconduct Under The Wagner Act; Developments Since The Fansteel Case*, 39 Col. L. Rev. 1369.

Board and the reviewing court upon this issue of fact. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461. The discharged seamen had worked for petitioner continuously for periods ranging from 6 weeks to 18 months [9] (R. 27; R. 124–125, 177–178, 196–197, 213, 278); petitioner's seamen customarily signed new articles when signing off the old and even when they did not, they nevertheless considered themselves engaged for the next voyage unless expressly notified to the contrary (R. 27; R. 153–154, 184–185, 199–201, 221–223, 300–301); and, finally, petitioner's officers significantly referred to the five men as having been "discharged" or "fired" because of their strike activity (R. 33, 35–36; R. 201–202, 224–225, 284, 338, 390–391, 394, 461–462, 491–492, 515). The evidence, in short, was essentially like that before this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 213–217; see also *South Atlantic S. S. Co.* v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, No. 969, October Term 1940. In any event, petitioner's contention, even if true, is immaterial, for if the employment relation did terminate, petitioner's refusal to rehire the men because of their strike activity was, as the Board found in the alternative (R. 28), equally an unfair labor practice under Section 8 (3) and (1) of the Act. *Phelps Dodge Corp.* v. *National Labor Rela-*

[9] Each round trip voyage of the *City of Fort Worth* took about 25 days (R. 27; R. 184, 213, 278).

tions Board, Nos. 387, 641, October Term, 1940, decided April 28, 1941.

3. Petitioner challenges (Pet. 3, 7, 21) the certification of the Union as exclusive representative, and the consequent finding of refusal to bargain, on the ground that the Board refused to permit employer representatives to be present at the election. The holding of the court below (R. 770–771) that the Board did not thereby abuse its discretion is in accord with the only other decision upon the question. *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586 (C. C .A. 2), certiorari denied, No. 1032, October Term, 1940, decided June 2, 1941.[10] While the presence of employer representatives may be helpful to Board representatives who conduct the election in their duty to determine the eligibility of the voters, the presence of company representatives may have the effect, though perhaps unintended, of inhibiting the employees so that the election results do not reflect the free and independent choice contemplated by the Act.[11] Accordingly, as a general rule, the Board

[10] The petition for certiorari in the *Marlin-Rockwell* case strongly urged the point.

[11] As the court below stated: "* * * it [the Board] may take the view, as it evidently did in this instance, that since the presence of such representatives, unless consented to, might operate in some degree to coerce the employees and prevent them from expressing their free choice, some other means of identifying voters should be employed. The Act confers no right upon the employer to have its representatives present and it is obvious that their presence is not essential to a fair election" (R. 770–771).

has not allowed employer representatives to be present at the polls unless the labor organization involved consents. *Third Annual Report of the Board* (1938), p. 147.[12] Nor, as the lower court pointed out (R. 771), has petitioner shown any prejudice. In these circumstances, the propriety of the exercise of the Board's discretion does not present any question calling for review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[12] Employer representatives were not permitted to be present at elections conducted by the old National Labor Board which administered section 7 (a) of the National Industrial Recovery Act. Lorwin & Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 159–161. See also, *First Annual Report of the National Mediation Board* (1935), p. 4.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage memberships in any labor organization: * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the

employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 320

SOUTHERN STEAMSHIP COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

NATIONAL MARITIME UNION OF AMERICA, INTERVENOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 769–785) are reported in 120 F. (2d) 505. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 14–44) are reported in 23 N. L. R. B. 26.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 786–789) was entered on May 20, 1941. The peti-

tion for a writ of certiorari was filed on July 30, 1941, and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether under the National Labor Relations Act seamen may be discharged for having engaged, as a result of their employer's unfair labor practices, in a peaceful strike on board the vessel on which they worked, which at the time of the strike was safely moored to the dock in a port of the United States.

2. Whether there is substantial evidence to support the Board's finding that the signing off of shipping articles did not terminate the tenure of employment of petitioner's seamen.

3. Whether the Board abused its discretion in refusing to permit the presence of representatives of the employer at an election held under Section 9 of the National Labor Relations Act to determine collective bargaining representatives.

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 8 and 9 of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). These provisions, and other statutes referred to in the argument, are set forth in the Appendix, *infra*, pp. 70–82.

STATEMENT

Petitioner owns and operates seven vessels carrying freight between the ports of Philadelphia, Pennsylvania, and Houston, Texas (R. 292, 669–670). On June 11, 1937, International Seamen's Union of America, affiliated with the American Federation of Labor, filed with the Board a petition requesting an investigation and certification of representatives for the unlicensed personnel of petitioner and other steamship companies, pursuant to Section 9 (c) of the National Labor Relations Act. After a hearing in which it appeared that both the International Seamen's Union and the National Maritime Union of America, affiliated with the C. I. O. (hereinafter sometimes called the Union), claimed to represent a majority of these employees, the Board on July 16, 1937, ordered that an election be held (R. 19, 671; see *In the Matter of American France Line et al.*, 3 N. L. R. B. 64). An election was thereupon conducted by the Board's regional director on the seven vessels owned by petitioner (R. 759–761). The report of the regional director, issued on January 3, 1938, showed that of 134 eligible voters, 73 voted for National Maritime Union, 4 for International Seamen's Union, and 51 for neither (R. 761).

Because of the refusal of the labor organizations named on the ballot to consent to the presence of a representative of the petitioner at the balloting,

the Board did not permit petitioner to have its representative present at the balloting conducted on the first of the seven vessels, namely, the S. S. *City of Houston,* which took place on October 13, 1937 (R. 763). Thereafter, in respect to the balloting which took place at later dates on the remaining six ships, the labor organizations withdrew their objections to the presence of petitioner's representatives at the election and petitioner's representatives were permitted to be present (R. 673). Petitioner filed objections to the election and to the Regional Director's report on the ballot, alleging that such election should be declared null and void because its representative was excluded from the balloting on the S. S. *City of Houston* (R. 76–78, 762–764). On January 26, 1938, the Board dismissed petitioner's objections and certified the Union as the exclusive representative of all employees of petitioner within the appropriate unit (R. 671–674).

Subsequently the Union filed charges that the company had refused to bargain with it, had terminated the employment of a number of employees because of their membership in and activity on behalf of the Union, and had thereby violated Sections 8 (1), (3), and (5) of the Act (R. 60–63). The Board issued a complaint (R. 63–67), held a hearing, and made findings in which it held these charges to be substantiated (R. 14–39). The per-

tinent facts as found by the Board and as disclosed by the evidence are as follows:

The refusal to bargain.—After the Board's certification of January 26, 1938, the Union made futile efforts to get petitioner to bargain with it. Shortly after the issuance of the certification the Union representatives in Houston and in Philadelphia requested a collective bargaining conference (R. 21, 590–592, 92–94). The representative in Houston was informed that the matter would be transmitted to Philadelphia; the representative at Philadelphia was informed by Sherry, the Marine Superintendent, that the matter was in the hands of petitioner's attorneys (*ibid.*). No further communications being received in answer to these requests, the representative in Philadelphia wrote Sherry (R. 21, 94, 112, 117), unsuccessfully sought to reach him by telephone several times in February and March (R. 21, 96–97), and finally called at his office but was refused permission to enter (R. 22, 97–99). Finally, on August 23, 1938, seven months after the certification and a month after the strike of July 18, to be discussed below, and after another letter to the company (R. 22, 675), the company replied that until the dispute arising out of the election was settled by the Board and the courts, the question of an agreement with the Union "is premature" (R. 22, 676). Sherry testified that this had been the company's position since the date of the certification on January 26

(R. 22, 543–545).[1] On the basis of these facts the Board found that since on or about January 26, 1938, the petitioner had refused to bargain collectively with the Union and that it had thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 22).

The strikes of July 18 and July 25, 1938, and the subsequent discharges.—On June 30, 1938, the crew of the S. S. *City of Fort Worth* signed on shipping articles at Philadelphia, Pennsylvania, for a voyage to such southern coastwise ports as the master should direct and back to Philadelphia, for a term not exceeding six months (R. 681–683). The shipping articles provided that (R. 681)—

> the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, * * * in everything relating to the vessel * * * whether on board, in boats, or on shore.

The ship sailed on July 1 with a crew of 27 seamen, 19 of them unlicensed personnel (R. 127, 318, 683). On Thursday, July 14, the ship docked at Houston, Texas, and was "tied right up against the dock" so that persons could walk directly from

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[1] The basis of the company's objection was the refusal of the Board to permit the company's representative to be present at the election conducted on the S. S. *City of Houston* (R. 114).

the ship onto the dock (R. 128, 137, 144–147). The petitioner's Houston office building was immediately adjacent (R. 146). The ship was scheduled to remain in port several days discharging the cargo brought from Philadelphia and taking on cargo for the return trip (R. 142, 170–171, 292–293, 432, 483, 670). The actual unloading and loading of cargo was performed by stevedores (R. 132, 142, 269–270, 670).

During the stay of the ship at Houston the crew continued to live on board just as during a trip at sea, sleeping in their bunk rooms and eating in the mess hall (R. 326, 405). They performed eight hours of "general ship work" a day and otherwise were free to enjoy themselves as they saw fit in their bunk rooms or on the poop deck, or, with the permission of the ship's officers, to go on shore (R. 143, 222, 239, 269, 272, 325, 452, 513).[2]

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[2] The duties during the stay in port of the five persons discharged were as follows: Smith was a mess boy and as such performed the same duties as when the ship was at sea, serving meals, washing dishes, making beds, and cleaning the mess hall and bunk rooms (R. 205–207, 407–409, 423–425, 427, 683). Tracey and Ferguson were firemen and oilers (R. 122, 131, 134, 177, 683). They were supposed to provide the steam necessary for the sanitary and safety appliances and for operating the winches used in loading cargo; also to keep the winches greased and oiled (R. 131–132, 182, 352). Pfuhl and Warren were able seamen, and while the ship was in port engaged in such duties as painting the smokestack or sides of the ship, cleaning the pilot house, and other odd jobs (R. 213, 269, 271, 272, 280, 301, 683).

On Saturday, July 16, some members of the crew went to the Union hall at Houston and arranged for a meeting to be held on Sunday, July 17, between the Union members of the crew and Union representatives in Houston for the purpose of ascertaining what progress the Union had made towards securing collective bargaining with petitioner (R. 593–594). When the crew learned at the meeting on Sunday, July 17, that, despite the Union's certification by the Board almost six months before, the petitioner still refused to recognize it, they voted to call a strike at eight a. m. the next morning for the purpose of inducing petitioner to recognize and bargain with the Union and issue boarding passes to its shore delegates (R. 128–131, 179–181, 241, 593–596).[3] At the meeting it was agreed that the men would keep watch "to see that there was no fire or anything," would permit the stewards' department to operate, and would at all times maintain and furnish sufficient steam to operate all of the ship's sanitary and safety devices, but not for operating the winches for loading cargo (R. 130–131, 595–596).

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[3] The company conceded that the issuance of passes to union delegates would have signalized recognition of the Union (R. 541–542). Petitioner has raised no issue with respect to the inclusion by the strikers of this demand. Cf. *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. (2d) 149 (C. C. A. 2).

About eight a. m. on Monday, July 18, while the vessel was still moored to the dock, the strike began when Tracey, the fireman and oiler on the four a. m. to eight a. m. shift and the Union delegate for the engine room, failed to turn the steam "on deck" for the purpose of loading cargo (R. 126, 128, 131–132, 180–181, 197, 219, 269). The first assistant engineer, Pool (or Paul), inquired of Tracey as to why there was no steam on deck and was told that the ship's unlicensed personnel was on strike for Union recognition (R. 132). Pool stated that he would put the steam on deck himself, whereupon Tracey replied, "Well, if you do, I will have to take the fireman out of the fireroom" (R. 132). When Pool turned the steam on, Tracey called upon the fireman on duty, Braun, a member of the Union, to join the strike, which he did (R. 133). At this point Ferguson appeared to relieve Braun whose watch had terminated (R. 134). Tracey told Ferguson that the strike had begun, so Ferguson refused to fire but remained present "to see that the steam wouldn't get too low so that the auxiliaries wouldn't stop" (R. 182). About 8:15 or 8:25 the second assistant engineer, Robinson, came in to fire up enough steam for the cargo loading, and told Ferguson, "Go on up, I will take care of things down here" (R. 134, 182, 355–356, 380–382). Tracey and Ferguson, after securing the express statement of Robinson that he would be responsible for maintaining the steam for

the safety and sanitary devices, left the engine room and joined the eleven other strikers who were seated on the poop deck, the general place of meeting and recreation for the seamen when off duty (R. 134–137, 182, 270–272, 355–356, 500). The ship's officers, together with the assistance of the six unlicensed seamen who did not participate in the strike, then proceeded with the necessary operations for the loading of cargo (R. 317–319, 355–356, 381–382). The strikers did not make the slightest attempt to interfere with any of the normal operations on shipboard performed by the officers and nonstriking members of the crew (R. 290–292, 293, 323–324, 375, 387–388, 404, 499–502). All the men did was merely to sit on the poop deck (R. 135–137, 241, 242, 290–291, 387–388, 500, 501–502).

The captain not being on board at the time (R. 431–432), the chief mate, Helland, who was in charge of the ship during the captain's absence, at once went to the poop deck to inquire what the trouble was (R. 268–272, 286–288). Warren, the Union delegate for the deck section, acting as spokesman for the men, complained that "the company had not been fair to them in regards to the election they had, they had won out, but the company didn't pay no attention to it" (R. 127, 268–272, 286–288). Warren stated that the Union representatives were on the docks, that Helland should go down and talk to them, that the men

were not going to work until the petitioner recognized the Union (R. 139, 268–272, 286–288).

When the ship's captain, Rudan, came on board, about 10:30 a. m., he tried to persuade the strikers that their conduct was unfair to him (R. 165–166, 219–220). The strikers, however, assured him that their action "was not taken against any officer of the ship, it was strictly against the company, we were striking for union recognition" (R. 219–220, 209–210, 165–169, 433, 483). Captain Rudan then advised the men that their conduct was in violation of the ship's articles which they had signed, and ordered them, individually and collectively, to resume their respective duties (R. 138, 165–166, 273–274, 382–383, 431–435). The strikers refused, asserting that the articles would not bar their refusal to work where the company had "done something that was wrong" by refusing to bargain and that they had a right to strike when the ship was safely moored in an American port (R. 483, 162, 219–220, 434–435, 440). Captain Rudan then brought aboard a deputy United States Shipping Commissioner who, reading from the shipping articles, advised the strikers that according to their articles they had agreed "to be obedient to the lawful commands of the master," and warned them that they were "subject to being logged two days for one" for not obeying orders (R. 437–440, 681).

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The men, nevertheless, persisted in their strike and throughout the day remained seated on the poop deck in an orderly manner (R. 137, 241, 242, 290–291, 375, 387–388, 499–502). They did not interfere with the work performed by the other members of the crew or the stevedores (R. 404). At no time were they ordered to leave the vessel (R. 325, 404, 513). Indeed, the permission of the master was sought and obtained before any of them left to go on the dock (R. 143, 513). At noontime the messboy, Smith, resumed his duties, and the twelve other strikers, with the captain's permission, joined the rest of the crew in the dining room where Smith served all the crew, both strikers and non-strikers, their dinner (R. 203, 206–207, 423–425).[4] After dinner the strikers returned to the poop deck (R. 137, 242). It was admitted by an officer that their refusal to work in no way endangered the safety of the ship (R. 387).

Union representatives were present on the dock throughout the day ready to negotiate with any of the petitioner's representatives, as the strikers repeatedly pointed out to the ship's officials (R. 137, 139, 147, 242–243, 272, 287, 589, 603–605).

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[4] While Smith regarded himself as a striker (R. 198), the extent to which he failed to perform his normal duties appears to have been slight. He had served breakfast and cleaned up the breakfast dishes before he joined the strikers on the poop deck (R. 203, 205–206). He served dinner to the whole crew (R. 423–424). Apparently his only omission was the failure to make up three cabins (R. 206, 427–429).

Late that afternoon, petitioner's local attorney, after telephoning petitioner's marine superintendent in Philadelphia (R. 515, 538–540, 640–642), advised the Union's attorney that if the strike were called off he would recommend to petitioner that passes be issued to the shore delegates to board petitioner's ships (R. 616–618, 642–643). Thereupon, Captain Rudan, after conferring with the petitioner's local agent and the shore delegates, gave the strikers permission to leave the ship for the purpose of conferring with their shore delegates upon the dock in order to see if the strike could be ended (R. 142–147, 242–243, 450–452, 489–490, 513). Relying upon the assurances given the Union attorney by petitioner's attorney, the strikers decided to return to work at once (R. 142–147, 620–621).[5] The strike ended at seven p. m. on the same day when the employees all went back to work (R. 147–149, 274–275, 490). The loading of the cargo had not been delayed by the strike and at nine p. m. that night the ship sailed on schedule (R. 147–149, 275, 292–293, 483).

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[5] One of the seamen stated: "He said everything was all right, he said our lawyer and their lawyer is going to get together, and by the time we get back to Philadelphia, everything will be straightened out, we will have passes for our delegates aboard by the time we reach Philadelphia, and by no means no one will be discharged when they got there" (R. 147).

All members of the crew, including the strikers, performed their duties on the voyage back to Philadelphia in a competent manner (R. 375–377, 388, 502). However, when the vessel docked at Philadelphia on July 25, 1938, and the crew signed off their shipping articles, five of the employees who engaged in the strike, namely, Warren, the Union delegate of the deck section; Tracey, the Union delegate of the engine section; Smith, the Union delegate of the steward section; Ferguson and Pfuhl, were discharged because of their participation in the strike (R. 126–127, 151–155, 185–186, 195, 201–202, 223–225, 284, 289–290, 298, 338, 391, 394, 493–494, 520–521, 533–534).

During the voyage home the Union members, anticipating the possibility that some might be discharged, had agreed that all would strike if any were let out by the company (R. 150–151, 185, 244). As a consequence of the discharge of the five men above referred to, when the ship docked in Philadelphia on July 25th all of the remaining Union members but one struck in protest[6] (R. 26, 156–158, 202, 226, 245, 248–249, 252–256, 390.

On the basis of the above facts the Board found that the strike in Houston was caused by the petitioner's refusal to bargain with the Union (R. 25), and that accordingly the discharge of the five sea-

[6] One of these men was subsequently reinstated (R. 136, 253–254, 340–341).

men because of their participation in such strike was unlawful (R. 31); and that the strike in Philadelphia was likewise attributable to petitioner's unfair labor practices since brought on by the discharge of the five men referred to (R. 26). The Board further found that petitioner's entire course of conduct had interfered with the employees' exercise of the rights guaranteed by Section 7, in violation of Section 8 (1) of the Act (R. 40).

The Board's order required petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union upon request, to offer reinstatement with back pay to the five seamen whose discharge violated Section 8 (3) and (1), to offer reinstatement upon application to the seamen who went on strike on July 25, and to post appropriate notices (R. 40–44).

Thereafter, petitioner filed in the court below its petition to review and set aside the Board's order and the Board answered requesting enforcement (R. 1–13, 45–52). The case was argued on October 8, 1940, before three judges (R. 767–768); on February 7, 1941, the case was restored to the argument list for rehearing before the court *en banc* (R. 768–769). On May 6, 1941, the court below handed down its opinion directing enforcement of the Board's order with a modification not here material, Judge Clark dissenting (R. 769–780). The court's decree was entered on May 20, 1941 (R. 786–789).

SUMMARY OF ARGUMENT

I

A. Since the discharges resulted from a strike brought on by petitioner's refusal to bargain, an unfair labor practice, there would clearly have been a violation of the National Labor Relations Act if the strike had occurred on land. The fact that the crew remained on the vessel, even though in a sitting position, instead of deserting, does not render their conduct unlawful. Since the men were not ordered to leave the ship and there was no illegal seizure of property or force or violence, but merely a use of the quarters available to the men, the doctrine of the *Fansteel* case does not apply.

B. 1. Nor does the fact that the strike involved the refusal of seamen on a ship to obey orders of the master in the present circumstances justify the discharges or preclude the Board from ordering reinstatement. An examination of the history of legislation relating to seamen manifests a congressional understanding that a peaceful strike for the purpose of compelling an employer to obey the law while a vessel is in a safe position in an American port is not unlawful. The cases are consistent with this view. The considerations underlying the requirement of strict discipline for seamen do not apply in such a situation.

2. Even if the strikers' conduct constituted a technical or minor violation of the law the Board would have the power to order reinstatement. The *Fansteel* decision has properly not been regarded as holding that all unlawful conduct, however trivial and however provoked by the employer, forfeits an employee's rights under the Labor Relations Act.

C. Nor does the fact that the seamen signed shipping articles requiring them to obey their officers mean that the strike was unlawful. Such a provision, required by law for seamen, is implicit in any contract of employment and does not constitute an agreement not to strike. In any event, by continuing to employ the men after the strike, petitioner waived the alleged breach of contract by them.

II

Petitioner's contention that the employment relationship terminated upon the signing off of articles at the conclusion of the voyage is unsound. The Board's finding that the tenure of employment continued is amply supported. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206. Even if the employment relationship terminated, the failure to rehire the men nevertheless was discriminatory and, therefore, an unfair labor practice. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177.

III

Petitioner had no right to have a representative present at the election conducted by the Board among the seamen. Accordingly its refusal to recognize the certification and bargain with the union certified was unjustified and unlawful.

ARGUMENT

I

THE DISCHARGE OF SEAMEN BECAUSE THEY ENGAGED IN A PEACEFUL STRIKE ON A SHIP MOORED SAFELY IN A DOMESTIC PORT FOR THE PURPOSE OF INDUCING THEIR EMPLOYER TO COMPLY WITH THE NATIONAL LABOR RELATIONS ACT IS AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF THAT ACT

A. THE BOARD'S ORDER WOULD HAVE BEEN PROPER IF A SIMILAR STRIKE HAD OCCURRED ON SHORE

Petitioner's brief has not denied that it has refused to bargain with the Union, that the strike in Houston was brought on by its refusal to bargain, or that the discharges resulted from the strike.[7] Nor can there be doubt that the Union

[7] Petitioner apparently has abandoned the contentions made before the Board, but unsupported by the record, that the seamen were discharged for other reasons than their participation in the strike. Petitioner still contends, however (Br., pp. 27–32), that the seamen were not "discharged," but that their employment terminated automatically with the expiration of the shipping articles at the end of the voyage. See pp. 62–64, *infra*.

represented the majority of the employees,[8] or that the refusal to bargain was an unfair labor practice. These facts are established by the record beyond the possibility of contradiction.

Petitioner does not dispute the well-established proposition that when a strike is caused by an unfair labor practice, the Board may require the reinstatement of employees discharged because of their participation in the strike. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3), certiorari denied on this point, 310 U. S. 655; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), certiorari denied, 304 U. S. 579; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 437 (C. C. A. 7). Indeed, in *National Labor Relations Board* v. *Mackay Radio & Tel. Corp.*, 304 U. S. 333, this Court held that, under Section

[8] Petitioner has attacked the validity of the certification on technical grounds but does not deny that a majority of its unlicensed personnel desired the Union to represent them (see pp. 64–68, *infra*).

2 (3),[9] the protection of the Act was available even to persons who had struck for other reasons.

Petitioner argues (Br. p. 15), however, that the strike in this case was a "sit-down," and that accordingly *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, is applicable.

Apart from the fact that the strikes in each case have loosely been characterized as "sit-downs," this case differs radically from the *Fansteel* case. The *Fansteel* opinion shows that the Court was not concerned with any mere "sitting-down," but with the illegal seizure and retention of the plant by force and violence and the refusal of the strikers to permit the owner to enter its property or to vacate the premises after they were discharged.[10]

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[9] Section 2 (3) reads, in part, as follows:

"When used in this Act— * * *

"(3) the term 'employee' shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *."

[10] Examination of the *Fansteel* opinion shows that the Court never described the strikers' conduct as "sitting down," but as "the seizure and retention of respondent's property" (306 U. S., at 252); illegally taking and holding possession of respondent's property (*ibid.*); "the seizure and holding of the buildings" (*id.*, at 253); the "ousting of the owner from lawful possession" (*ibid.*); "resort to force" (*ibid.*); "the seizure and holding of its buildings" (*id.*, at 254); "seizing or committing depredations upon the property of their employer" (*ibid.*); "acts of trespass or violence against the employer's property" (*id.*, at 255); "illegal seizure of the buildings" (*id.*, at 256); "resort to force and violence" (*id.*, at 258); "seizure of the plant" (*id.*, at 259).

Peninsular & Occidental S. S. Co. v. *National Labor Relations Board,* 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653, upon which petitioner also relies (Br. p. 19), involved, the court thought, the seizure of property, a vessel, by strikers who did not merely sit down, but "took possession of the ship" and "contemplated * * * sabotage" (98 F. (2d), at 413).[11]

Here the striking seamen did not seize or take or retain possession of anything, or interfere with the operation of the ship by other persons; they merely remained in the quarters assigned to them and refused to work. Petitioner did not discharge them or order them to leave the vessel. Indeed, petitioner inferentially conceded that the conduct of the strikers was less serious because they did not leave the ship thereby becoming deserters.[12]

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[11] It is unlawful, of course, for the men to remain on board against the will of the owners. The cases of *The Oakmar*, 20 F. Supp. 650 (D. C. Md., 1937), and *The Losmar*, 20 F. Supp. 887 (D. C. Md., 1937), cited by petitioner (Br., pp. 20–21) upheld the right of the owner of ships to recover the ships by possessory libels where the seamen refused to vacate. The National Labor Relations Board held that the owner of *The Oakmar* and *The Losmar* was justified in discharging the employees who refused to vacate those ships and that such a discharge did not constitute an unfair labor practice. *In the Matter of Calmar Steamship Corporation*, 18 N. L. R. B. 1.

[12] See Transcript of oral argument before the Board, pp. 41–42, and R. 30n. For the strikers to have left the ship would have constituted desertion, punishable by forfeiture of wages already earned and clothing and effects remaining on board (46 U. S. C., Sec. 701).

It would indeed be anomalous to hold that striking seamen who avoided the statutory offense of desertion by remaining on board the vessel in accordance with the obvious desire of the master were by reason of that very fact guilty of an unlawful "sit-down".

The ship, of course, was the home of the sailors, even when in port, as petitioner's officers admitted (R. 326, 405); the master agreed (R. 500) that the poop deck, upon which the strikers sat, was the normal gathering place for the men when off duty. A comparable situation ashore, which would obviously not be deemed unlawful, would arise if striking lumbermen living in company-owned facilities remained peaceably in or just outside of their bunkhouses, even if they spent most of the time sitting. There would not even be a technical trespass until and unless the company ordered them to leave.

National Labor Relations Board v. *American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2), affirmed 309 U. S. 629, is closely in point. The Circuit Court of Appeals there stated (p. 68):

> We do not regard the action of these or other employees in standing around the premises for a period of not more than two hours, while an attempt was being made to persuade the Company to fix a date for collective bargaining with T. W. O. C., as in the nature of a sit-down strike which would permit the termination of the em-

ployee relationship. They certainly were not claiming to hold the premises in defiance of the right of possession of the owner and we regard the case as no different from that of an ordinary strike where work has ceased because of an unfair labor practice.

B. THE FACT THAT THE STRIKE INVOLVED THE REFUSAL OF SEAMEN ABOARD SHIP TO OBEY ORDERS OF THE MASTER DID NOT, IN THE PRESENT CIRCUMSTANCES, JUSTIFY THE DISCHARGES OR PRECLUDE THE BOARD FROM ORDERING REINSTATEMENT

Petitioner's argument stresses the fact that the strike involved the refusal of seamen aboard a ship to obey orders of their superiors.

It is not claimed that anything in the National Labor Relations Act places seamen in a different category from other employees. The Act has frequently been applied to them. *E. g., National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), certiorari denied, 304 U. S. 579. Indeed, the Merchant Marine Act, 1936, as amended in 1938, expressly ratified the application of the Labor Relations Act to seamen (52 Stat. 965, 46 U. S. C., Sec. 1252, Appendix, *infra*, pp. 81–82).

Petitioner's contention is that because of the necessity for discipline and obedience to the master's commands in order to insure the safety of the ship, disobedience is under all circumstances unlawful and a discharge for such disobedience per-

missible.[13] It is claimed that because the need for obedience exists when a ship is at sea or is not in a safe position in port, the authority of the master must always be recognized, both as a matter of general disciplinary policy and because of the difficulty of determining when a ship is in a safe position.[14] The fact that the employees' disobedience consisted of a peaceful strike brought on for the purpose of inducing petitioner to obey the law, while the ship was tied to the dock and in no

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[13] Petitioner (Br. p. 25) states that the Department of Commerce "considers lack of discipline the main cause of unsafety" of American vessels, citing a Maritime Commission Survey of the Merchant Marine. This report, however, shows that unsatisfactory labor relations in the maritime industry, just the same as those on land, arise from suppression of the right to organize and bargain collectively and that the solution is not penalization of workers who seek to achieve these rights but insistence that employers accord them. House Doc. No. 392, 75th Cong., 2d Sess., United States Maritime Commission, *Economic Survey of the American Merchant Marine* (November 10, 1937), pp. 46–49.

[14] It does not follow, of course, that lack of discipline at sea will result from the assertion by seamen of their rights while they are in port. Seamen's unions themselves have explicitly recognized this. A pamphlet published by the C. I. O. Maritime Committee and the National Maritime Union of America, dealing with safety at sea, states:

"Maritime workers, no less than shipowners, subscribe wholeheartedly to the tradition that when a vessel is under way or is not in a safe harbor, the seaman must obey the orders of his superior. No seaman questions this. He has a greater interest in safety-at-sea than the shipowner. The operator has nothing to lose but a ship; the seaman has his life." (The C. I. O. Maritime Committee and the National

way in danger, is apparently not thought by petitioner to be material.

The Government's position is (1) that in the circumstances of this case the strikers' conduct was not illegal, and (2) that even if in a technical sense it were, the strikers would not have forfeited their right to reinstatement under the National Labor Relations Act.

1. In the circumstances of this case the strikers' conduct was not illegal

Petitioner's argument that the strikers' conduct was illegal seems to rely mainly on cases under the statute prohibiting revolts and mutiny (4 Stat. 775,

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Maritime Union of America, *Who's Guilty?* (May 1940) p. 24.)

The position of the United States at a conference of the International Labor Office at Geneva in 1920 has been described as follows:

"The requirements of the sea service make it necessary that more stringent disciplinary measures be applied to seamen at sea than to men in other classes of industry. A distinction should be made between the service of seamen while at sea and while in a safe harbor. In the former case suitable penalties should be provided to enforce obedience and the efficient performance of their duties by seamen, but while in a safe harbor seamen should be subject to only such civil liabilities as those to which other classes of workmen are subject." (*Laws and Agreements Governing Working Conditions Among American Seamen*, Monthly Labor Review, Vol. 10, pp. 1075, 1094 (May 1920), Government Printing Office.)

See Hohman, *Maritime Labour in the United States*, International Labour Review, Vol. 38, pp. 190, 199 (International Labor Office, Geneva, August 1938).

18 U. S. C., Secs. 483, 484, Appendix, *infra*, pp. 72–73). The applicability of this and related laws to the instant case may best be determined by an examination of the history of legislation in this field.

(a) *The course of legislation.*—The first statute punishing mutiny was the Act of April 30, 1790, c. 9, 1 Stat. 112–115. Section 8 of that Act provided that every mariner who "shall make a revolt in the ship" shall be deemed "a pirate and felon", punishable by death. Section 12 provided that any seaman who "shall confine the master * * *, or endeavour to make a revolt" shall be subject to three years' imprisonment.

These provisions were replaced by Sections 1 and 2 of the Act of March 3, 1835, 4 Stat. 775–776, which have since been reenacted in the Revised Statutes of 1878,[15] and as Sections 293 and 292 of the Criminal Code of 1909[16] without substantial change, and are still in effect (18 U. S. C., Secs. 484, 483). Since the first compilation of 1878 these sections have borne the titles "Revolt or Mutiny on Shipboard" and "Inciting Revolt or Mutiny on Shipboard." They read as follows:

> § 484. REVOLT OR MUTINY ON SHIPBOARD. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and

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[15] Rev. Stat. 5360, 5359.

[16] Sections 293, 292 (35 Stat. 1146).

maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than $2,000 and imprisoned not more than ten years.

§ 483. INCITING REVOLT OR MUTINY ON SHIPBOARD. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than $1,000, or imprisoned not more than five years or both.

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In the debate in the Senate on the 1835 Act, Senator Shepley "moved to strike out the words in the bill which authorized punishment to be extended to neglect of duty". Senator Clayton, who reported and explained the bill, "opposed the motion on the ground that it was only designed to apply to conspiracies by the crew to neglect their duties, *so as to endanger the safety of the ship and crew*" (2 Cong. Globe 265). [Italics supplied.] The motion was defeated and the bill passed without change (*id.*, at 276, 298).

The next pertinent statute dealing with the conduct of seamen was the Act of June 7, 1872, c. 322, 17 Stat. 262, 273, which was entitled, *inter alia*, an Act "for the further Protection of Seamen". Section 51 of this law, which became Section 4596 of the Revised Statutes of 1878, Appendix, *infra*, pp. 73–75, made liable to punishment seamen who engaged in any of nine specified offenses. These included "first, * * * desertion", which was punishable by imprisonment up to three months; "fourthly, * * * willful disobedience to any lawful commands", punishable by imprisonment up to two months; "fifthly, * * * continued willful disobedience to lawful commands, or continued willful neglect of duty", punishable by imprisonment up to six months; and "seventhly, for combining with any other or others of the crew to disobey lawful commands or to neglect duty * * *", which was punishable by imprisonment

up to twelve months. Forfeiture of wages and the payment of civil penalties were also prescribed for these offenses.

The seventh clause quoted might have been construed to prohibit strikes by seamen, as a combination to disobey lawful commands. This clause was repealed by the Act of December 21, 1898, 30 Stat. 755, 760–761, and the words "at sea" were inserted in the fourth and fifth clauses prohibiting willful disobedience. See Appendix, *infra*, pp. 75–78. The penalties were also lessened. The effect of these changes was completely to eliminate the clause which might have prohibited all strikes and to limit the prohibition against willful disobedience to situations at sea—when, of course, the safety of the vessel might be endangered. Presumably strikes at sea would still constitute willful disobedience, within the meaning of the fourth and fifth clauses as amended.

That it was the purpose of the 1898 law to give seamen the same rights as workers on land, except when considerations of safety prevented, appears from the explanation of the bill by its sponsors on the floor of the House. Representative Payne, who was in charge of the predecessor to the bill which became law in the following Congress, stated that "the committee have stricken out of the bill every vestige of imprisonment for violating a civil contract" (28 Cong. Rec. 6286). Representative McGuire, who had introduced the

original bill, stated that the bill "is a great advance over existing laws" in according to sailors the "rights that are common to American citizens in all other trades, callings, and occupations under the American flag," and that the bill "proceeds upon the principle that the sailors in our merchant-marine service should, in their personal rights, be placed upon equality with American citizens engaged in other industrial disputes" (28 Cong. Rec. 6288).

The discussion in the committee report (H. Rep. 1657, 55th Cong., 2d Sess.) with respect to the proposed changes in the penalties for desertion,[17] also throws light upon the congressional understanding as to the right of seamen to strike. The report states (p. 4):

> * * * Section 20 (4596, R. S.): The bill itself was a great change from the present law in that it left all imprisonment for desertion in the discretion of the court, instead of absolute as now. But your committee have gone further to relieve the maritime laws of their strictness, and have eliminated by their amendment all imprisonment for a violation of civil contract. They are not unmindful of the inconvenience and loss

[17] The bill as reported to the House abolished imprisonment as a penalty for desertion; the Act as passed eliminated this penalty for desertion only in American ports, and merely reduced the penalty for desertion in foreign ports. See 32 Cong. Rec. 129–132. The 1915 Act (*infra*, p. 31) eliminated the criminal penalty entirely.

> that may occur to the vessel by reason of the seaman's disregard of the obligations of his agreement. In the case of employers on railroads great inconvenience and loss *often follow a strike,* but no one proposes imprisonment as a remedy. [Italics supplied.]

The laws relating to seamen, including R. S. 4596, were again revised in the LaFollette Act of March 4, 1915, 38 Stat. 1164, 1166 (Appendix, *infra,* pp. 78–80), but no change material here was made in the specific provisions referred to above;[18] although reenacted, they have remained in substantially their 1898 form up to the present time (46 U. S. C., Sec. 701).

The object of the 1915 Act was to ameliorate the conditions of seamen. The report of the House committee is a definite manifestation of what Congress thought the legislation for the benefit of seamen had accomplished, and of what Congress assumed the rights of seamen in port to be. The report[19] states (H. Rep. 645, 62d Cong., 2d Sess., pp. 6–7):

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[18] The change in the penalty for desertion is described in Note 17, *supra.*

[19] The bill which was finally passed in 1915 during the 63d Congress was first introduced and reported in the 62d Congress, and the House Report quoted was submitted to the earlier Congress in 1912. No relevant changes were made in these provisions of the bill before final enactment. Language identical with that in the quoted passages from the report also appears in a letter from the Secretaries of Commerce and Labor to the Chairman of the Committee on Commerce

* * * In the judgment of your committee this bill will be more far-reaching than any measure now pending in Congress. There is no other portion of our citizens or residents who can be compelled, under penalty of imprisonment, to fulfill a civil contract to labor. The seamen alone remain as the last remnant of serfdom. The seaman may be, and is, compelled to sign a contract to labor before he can secure employment, and to fulfill such contract after he has signed it, and the inevitable result has followed, that the self-respecting man or boy prefers employment on land to that of employment at sea, and only those accept a

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of the Senate recommending that the same bill as reintroduced in the 63d Congress be passed (Sen. Doc. No. 211, 63d Cong., 1st Sess.). The House report in the 63d Congress (H. Rep. 852, 63d Cong., 2d Sess.), after referring both to the Democratic and Republican 1912 platforms, declared (p. 25): "Enlightened public sentiment of the present age is opposed to the arrest and imprisonment of any person, without reference to his occupation, for violation of his civil contract of employment. * * * While it has been urged with great force by the shipping interests that the repeal of the laws and treaties providing for the arrest and imprisonment of deserting seamen will lead to serious disorder and inconvenience, and will seriously handicap them in securing efficient crews for their vessels, this question has been agitated for many years, and all the arguments for and against it have been carefully weighed by the committee, and the committee is unanimous in its opinion that such laws and treaties should be repealed. It might be well to state that such laws, as they apply to our coastwise vessels, were repealed many years ago, and no serious consequence has been shown to have resulted therefrom."

seafaring life who by propinquity or necessity are compelled to do so.

* * * * *

This bill relieves him from that condition. By relieving the seaman from any criminal proceeding for violating a contract to labor, leaving only the civil process as a remedy, *you place him exactly in the same position as other workmen,* and the result will be to gradually improve the standard of the men who go down to the sea, not only of those in our own shipping, but of those in all ships entering our ports, until it has reached the same standard as that of workmen on land.

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* * * Under existing laws men may be and are employed at the ports where the lowest standard of living and wages obtain. The wages in foreign ports are lower than they are in the ports of the United States; hence the operating expenses of a foreign vessel are lower than the operating expenses of an American vessel. It is not proposed to prevent vessels from employing seamen in ports where they can secure them cheapest, *but it is proposed by this bill to give the seamen the right to leave the ship when in a safe harbor,* and in time this will result in foreign seamen engaged on vessels coming into ports of the United States being paid the same wages as obtain here, as a means of retaining their crews for the return voyage. That will equalize the cost of

> operation, so that vessels of the United States will not be placed at a disadvantage. [Italics supplied.]

Most significantly, the report summarized Section 6 of the proposed bill, which was the reenactment of R. S. 4596 as amended, as follows (p. 8):

> *Section 6 amends existing law so as to give the seaman the same freedom as landsmen when his vessel is in a safe harbor and to enforce proper discipline while at sea.* [Italics supplied.]

At the same session Congress enacted Section 20 of the Clayton Act (38 Stat. 730, 738, 29 U. S. C., Sec. 52, Appendix, *infra*, pp. 80–81). That section provides:

> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; * * * *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.* [Italics supplied.]

The latter provision this Court has recently declared to be a "catch-all" to relieve the practices previously described in Section 20 from "all illegal taint" (*United States* v. *Hutcheson*, 312 U. S. 219, 230). The "public policy of the United States"

for which the Clayton Act stands has been reaffirmed by Congress both in the Norris-LaGuardia Act of March 23, 1932, 47 Stat. 70 (29 U. S. C., Secs. 101–115) [20] and in the National Labor Relations Act itself.

Finally, we believe it of some relevance that in June 1938 Congress added to the Merchant Marine Act, 1936 (49 Stat. 1985), the title on maritime labor relations, the policy of which was to encourage collective bargaining, which expressly reaffirmed all obligations created under the National Labor Relations Act (52 Stat. 965, 46 U. S. C., Secs. 1251–1262, Appendix, *infra*, pp. 81–82). The 1938 statute not only required that all disputes between maritime employers and employees be considered in conference between authorized representatives of the parties, but also provided that it should be the duty of employers to set a time for such conferences within five days after the receipt of a request therefor (46 U. S. C., Sec. 1256 (expired June 23, 1941. Pub. No. 124, 77th Cong., 1st Sess.)).

It is clear from this review of the history of the statutes bearing upon this problem that a peaceful strike while a ship is in a safe position at the dock no longer violates any of the clauses in Rev. Stat. 4596, and its successors (46 U. S. C., Sec. 701). That statute, as has been shown, was deliberately amended so as to eliminate the clause punishing combining to disobey commands, and also so as to

[20] Cf. *United States* v. *Hutcheson*, 312 U. S., at 231.

restrict the offense of willful disobedience to conduct at sea.

The only other statute which might be applicable is the mutiny Act of 1835, now Sections 292 and 293 of the Criminal Code (18 U. S. C., secs. 483–484). Insofar as this statute might ever have applied to a peaceful cessation of work in port, it would seem to have been superseded by Section 20 of the Clayton Act.[21] If so, that is conclusive of the issue here.

But even apart from the Clayton Act, we believe that the language of the original statute and the course of legislation show that Congress, over a period of years, has not deemed the mutiny laws to be applicable to offenses of this type. In the first place, even though the words "solicits * * * any other of the crew to disobey * * * or neglect their proper duty"[22] might literally be

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[21] Since the Clayton Act does not differentiate between conduct at sea and on land, it might be deemed applicable to peaceful strikes even when the vessel is not in port. That question, of course, need not be determined in this case. In any event, even if the mutiny acts were held inapplicable to such strikes at sea, Paragraphs Fourth and Fifth of Rev. Stat. 4596, as reenacted in 1915, 38 Stat. 1166 (46 U. S. C., Sec. 701) *after* the Clayton Act (Act of October 15, 1914, 38 Stat. 730, 29 U. S. C., Sec. 52) penalize willful disobedience at sea, and still remain available for the punishment of seamen who disobey, individually or in combination, while not in port.

[22] The Act also applies to one who endeavors or combines to make a revolt or mutiny. These words we believe would have to be stretched considerably to apply to situations like that at bar.

deemed to cover peaceful efforts to persuade others to strike, the 1835 Act, read as a whole, demonstrates that Congress had something much more serious in mind. The emphasis is on revolt and mutiny, as is brought out not only by the text but by the titles given to the sections in the Revised Statutes, the Criminal Code, and the United States Code. These terms are defined in Section 484 (18 U. S. C.) as unlawfully and with force or by fraud or intimidation usurping command of a vessel or resisting officers and depriving them of their authority (*infra,* pp. 72–73). Section 483, which deals with endeavors to mutiny or the incitation of others to do so, must be read in the light of this definition of the primary offense. The meaning to be given the concluding phrases in this section can best be gathered from their context. Cf. *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 568. The maxim *ejusdem generis* also has obvious application.

That the Congress which passed the Act was of this opinion may be inferred from the remark of Senator Clayton that the phrase "neglect of duty" meant only that which "endangers the safety of the ship and crew" (see p. 28, *supra*). Moreover, the expression "solicits, incites, or stirs up * * * to disobey or resist the lawful orders of the master * * * or to refuse or to neglect their proper duty," read as a whole, in itself carries a connotation of threatened disorder, intimidation or violence.

That mere combining to disobey, in the absence of such factors, was not designed to be reached by the 1835 act appears from the provision in the 1872 statute punishing by one year imprisonment, instead of five, "combining * * * to disobey lawful commands or to neglect duty." This provision in the 1872 law would have been entirely unnecessary if the 1835 Act with its heavier penalties applied to the same offenses.[23]

The repeal of this provision in 1898, together with the restriction to conduct "at sea" of the penalties for willful disobedience, manifests a congressional intention that a peaceful combination to disobey in port is not unlawful. In view of the expressed purpose of the framers of the 1898 Act to "improve the condition of the American sailor," and "relieve the maritime laws of their strictness" (H. Rep. 1657, 55th Cong., 2d Sess., p. 4),[24] it would be absurd to conclude that the repeal of the clause had the effect of reinstating a statute penalizing the same conduct five times as severely.

The Acts of 1898 and 1915 were enacted in response to efforts of organized maritime workers

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[23] We do not think that the 1872 Act can properly be deemed to have amended, or limited the effect of, or reduced the penalties under the 1835 enactment. The codifiers have treated the two measures as entirely separate and unrelated, and we think properly so. The legislative history of the 1872 act throws no light upon the problem. Cf. *In Re Simpson* 119 Fed. 620 (D. Maine, 1901).

[24] See, also, S. Rep. 832, 54th Cong., 1st Sess.; 29 Cong. Rec. 548–549; 32 *id.* 129–132.

to secure the same right to strike when in a safe harbor as was enjoyed by workers on land.[25] The proponents of the 1898 and 1915 statutes plainly assumed that, except for the necessity of insuring obedience at sea, they were raising the status of seamen to that of the worker on shore. Their failure to touch or amend the mutiny statute can be explained only on the assumption that they never dreamed that the conduct which they were protecting against relatively minor penalties constituted a felony under laws applicable to "revolt or mutiny."

If the entire course of legislation covering the period from 1835 to 1915 had been compressed into a short period, in which the personnel of Congress had not materially changed, there could be no doubt as to its pertinence to the construction of the 1835 Act. When evidence of congressional intention is derived from legislative action at wide intervals over a period of eighty years, the concept of a personalized and continuing legislative intent is more difficult to sustain.[26] Nevertheless, it is not entirely fictional to treat Con-

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[25] Hohman, *Maritime Labour in the United States*, International Labour Review, vol. 38, pp. 190, 198–207 (International Labor Office, Geneva, August 1938); U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 342, *International Seamen's Union of America: A Study of Its History and Problems*, pp. 4–6, 16–17, 29–39.

[26] See Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863; Landis, *A Note on "Statutory Interpretation,"* *id.*, 886.

gress, like a court, as a continuing entity, despite changes in personnel, and to determine what its pronouncements mean by looking at them as an integrated whole even over a period of years.

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law. * * * and if it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman,* 3 How. 556, 564; *Cope* v. *Cope,* 137 U. S. 682, 688; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309; *United States* v. *Stewart,* 311 U. S. 60, 64. Uncertainties as to the interpretation of the 1835 Act in the light of its contemporaneous history thus may reasonably be resolved by heeding what subsequent Congresses, which might otherwise have amended it, understood it to mean.

In this case, moreover, we need not be primarily concerned with what the 23rd Congress intended in 1835 but with what the 74th Congress intended in 1935. The issue to be decided is whether particular discharges violated the National Labor Relations Act, or, more specifically, whether they

were justified because of the policies proclaimed in earlier legislation. In determining whether the Congress which passed the Labor Relations Act would have deemed discharges justified because of acts which might have violated a law enacted in 1835, we should give effect to what those who passed the Labor Relations Act would have assumed the earlier statute to mean. We believe that there can be no doubt that, at least for the last fifty years, Congress has assumed that the peaceful cessation of work, while a vessel was in a safe position in port and in order to attain a lawful objective, did not come within the purview of the statutes prohibiting mutiny.

(b) *The authorities.*—The petition for certiorari (p. 7) declared that the question here presented had not been settled by this Court, and referred to the statement by the court below that, upon authority, the question was an "open one" (R. 777). We can go further and state that, despite the numerous cases cited in petitioner's brief, there are no authorities involving a precisely similar question.

The essential facts in this case are as follows:

1. The men ceased work in order to induce their employer to obey the law.

2. The strike occurred not merely in an American port, but while the ship was moored to the dock in a safe position, and while the men remained on board and were willing to do anything essential to the safety of the vessel.

3. The strike was entirely peaceful; the men did not seize control of or otherwise interfere with the operation of the ship.

The cases upon which petitioner relies should be examined with these considerations in view.

Although many cases under the mutiny act have applied that statute to ships in port or in a harbor, none have involved vessels moored to the dock or in a definitely safe place in an American port.[27] A ship anchored in a harbor some distance from land is not necessarily safe. The modern decisions involve ships in foreign ports. *Hamilton* v. *United States,* 268 Fed. 15 (C. C. A. 4, 1920), certiorari denied, 254 U. S. 645 (three miles out, in Bermuda); *Rees* v. *United States,* 95 F. (2d) 784 (C. C. A. 4, 1938) (Montevideo); *United States* v. *Albers,* 115 F. (2d) 833 (C. C. A. 2, 1940) (Colombo, India). In the *Hamilton* and *Rees* cases the vessels were not in a safe place in

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[27] The cases involving vessels in American ports are: *United States* v. *Haines*, 26 Fed. Cas. No. 15,275 (C. C. D. Mass., 1818); *United States* v. *Hamilton*, 26 Fed. Cas. No. 15,290 (C. C. D. Mass., 1829); *United States* v. *Gardner*, 25 Fed. Cas. No. 15,188 (C. C. D. Mass., 1829); *United States* v. *Barker*, 24 Fed. Cas. No. 14,516 (C. C. D. Mass., 1829); *United States* v. *Lynch*, 26 Fed. Cas. No. 15,648 (C. C. S. D. N. Y. 1843); *United States* v. *Staley*, 27 Fed. Cas. No. 16,374 (C. C. D. R. I., 1846); *United States* v. *Nye*, 27 Fed. Cas. No. 15,906 (C. C. D. Mass., 1855).

Different considerations may well apply to vessels in foreign ports. Cf. *United States* v. *Roberts*, 27 Fed. Cas. No. 16,173 (C. C. S. D. N. Y., 1843) (Havre, France); *United States* v. *Cassedy*, 25 Fed. Cas. No. 14,745 (C. C. D. Mass., 1837) (St. Helena); and cases cited in text.

the harbor; the position of the ship in the *Albers* case does not appear. In the *Rees* case the Circuit Court of Appeals declared (p. 792):

> The defendants contend that the crew of a vessel which is moored to a dock or is at anchor in a safe harbor have the right to strike and that the Mutiny Act, 18 U. S. C. A., § 483, has no application to seamen in such a situation. But that question is not presented for decision in this case. As we have already pointed out, the *Algic* was not in fact moored to the dock or at anchor in a safe harbor, but was in such a position that the obedience of the crew to the orders of the master was essential to her safety. In such a case, the same rule is applicable as though the vessel were at sea, as this court decided in *Hamilton* v. *United States*, 4 Cir., 268 F. 15.

It is true that a number of the early cases, most of which were decided prior to 1835 and all before 1860, held or assumed that the mutiny act applied to ships in port without any discussion as to whether the vessel was in a safe place.[28] Some of these cases involved violent resistance to the master's orders,[29] but others held that the law was violated by a peaceful refusal to work while a vessel

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[28] See Note 27, *supra*, p. 42.

[29] *United States* v. *Hamilton*, *United States* v. *Roberts*, both *supra*, Note 27; *United States* v. *Stevens*, 27 Fed. Cas. No. 16,394 (C. C. E. D. Pa., 1825) (St. Domingo).

was in a harbor.[30] These cases differ from the instant case, not only in that the vessels involved were not moored to the dock, but in that the court in each deemed the reason for the refusal to work to be illegal. In a number of them the crew refused to work under a different master than was specified in the articles.[31] In another the crew was insisting upon a one-day watch below deck.[32] In others the crew was claiming erroneously that the voyage had terminated and that its obligation to work had expired.[33]

Moreover, the early cases arose before unions for maritime labor were organized and before the right of labor to bargain collectively was recognized by employers or accorded legal protection.[34]

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[30] *United States* v. *Haines*, *United States* v. *Nye*, *United States* v. *Barker*, *United States* v. *Gardner*, all *supra*, Note 27, p. 42; *United States* v. *Cassedy*, 25 Fed. Cas. No. 14,745 (C. C. D. Mass., 1837) (St. Helena); *Hamilton* v. *United States*, 268 Fed. 15 (C. C. A. 4th, 1920), certiorari denied, 254 U. S. 645 (Bermuda).

[31] *United States* v. *Hamilton*, *United States* v. *Haines*, *United States* v. *Nye*, *United States* v. *Cassedy*, all *supra*, Note 27, p. 42.

[32] *United States* v. *Gardner*, *supra*, Note 27, p. 42.

[33] *United States* v. *Barker*, *supra*, Note 27, p. 42; *Hamilton* v. *United States*, *supra*, p. 42.

[34] Paul S. Taylor, *The Sailors' Union of the Pacific* (Ronald Press, 1923), pp. 46–49; United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 342, *International Seamen's Union of America: A Study of its History and Problems* (1923), pp. 3–5.

The only case under the mutiny act which mentions a union is the *Rees* case, decided in 1938 (see pp. 42–43, *supra*), which expressly refrains from passing on the present question.

Indeed, seamen during the nineteenth century were regarded even by this Court "as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults * * *" (*Robertson* v. *Baldwin,* 165 U. S. 275, 287).

In none of the cases was the crew seeking to compel the employer to cease disobeying a statutory command, as is the case here. The analogy of the authorities which hold that a crew may rightfully refuse to obey orders if it reasonably believes a vessel to be unseaworthy[35] suggests that the lawfulness of the demand has always been an important factor.

Another group of cases which indicate that strikes when a vessel is safe in port are not illegal have arisen out of attempts by employers to use such strikes as a defense to suits by seamen for wages. Although mutinous conduct works a forfeiture of all wages due,[36] the right of the men to recover in such cases has been upheld. *Weisthoff* v. *American-Hawaiian S. S. Co.,* 79 F. (2d) 124 (C. C. A. 2), certiorari denied, 296 U. S. 619; *The Sonderburg,* 47 F. (2d) 723 (C. C. A. 4), certiorari denied, 284 U. S. 618; *The Blake,* 1 W. Rob. Adm. 73, 166 Eng. Rep. 500 (1839). The *Weisthoff*

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[35] *United States* v. *Staley, supra,* Note 27, p. 42; *The Condor,* 196 Fed. 72 (S. D. N. Y., 1912) and cases cited.

[36] *The Shawnee,* 45 Fed. 769 (E. D. Wis. 1891); *The Mentor,* 17 Fed. Cas. No. 9,427 (C. C. D. Mass., 1825).

case involved a strike on a ship tied up in New York harbor. The Circuit Court of Appeals for the Second Circuit stated (79 F. (2d), at 125):

> The allegations that they attempted to make a revolt and deserted so as to forfeit their wages under 46 U. S. C., § 701 were not sustained in the District Court, and we do not find more than the making of demands, some of which were ill-advised and called for action they should have known the master could not take, instead of putting their case to him on tenable statutory grounds which entitled them to their discharge and pay. It was rather a case of poor judgment and misunderstanding of their rights than the gross misconduct which will forfeit wages.

In *The Sonderburg* case the crew went on strike on board the ship while it was safely moored in Halifax. The master had the crew arrested and charged with mutiny, but the Canadian court dismissed the mutiny charges. The crew thereafter sailed the ship back to the United States. The master refused to pay them any but trifling amounts, claiming a forfeiture on account of their conduct at Halifax, but the court without question allowed them to recover their full wages.

In *The Blake, supra,* Dr. Lushington, in refusing to forfeit the wages of intoxicated seamen who had refused to work, declared:

> It is also to be observed, that the occurrence took place in port, where the ship was exposed to no hazard; and I draw a strong line of distinction between disobedience of orders in port, and any insubordination whatever when the vessel is on the high seas, where it might expose to destruction, the ship, cargo, and lives of all on board.

We are not suggesting that offenses on a vessel safely moored in port are not within the jurisdictional limits of the mutiny statute, which applies to acts "within the admiralty and maritime jurisdiction of the United States", but that a peaceful refusal to work for a valid reason while the ship is so located does not constitute a mutiny or other violation of the statute's substantive provisions. A forceful usurpation of authority, even when the vessel is tied to a dock, might come within the statute. Cf. *Peninsular and Occidental S. S. Co.* v. *National Labor Relations Board,* 98 F. (2d) 411, 414 (C. C. A. 5), certiorari denied, 305 U. S. 653.

Viewed as a whole, we think it fair to state that the judicial authorities support our construction of the maritime statutes as not outlawing peaceful strikes by seamen on a vessel safely moored in an American port, at least when the object of the strike is clearly lawful. The modern cases appear to recognize such a right, and the older ones all deal with different situations.

This view of the statutes and cases is supported by the reasons which underlie the stringent rules of discipline applicable to seamen and the heavy penalties imposed for disobedience. The basic consideration is, of course, the safety of the vessel, the passengers, the cargo, and the crew itself. In addition there is the absence of civil authority when the ship is at sea. Neither of these factors is present when the vessel is safely [37] moored in an American harbor,[38] and they certainly do not apply when the crew of a ship so situated is merely

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[37] A vessel, even when moored to the dock, is not of course absolutely safe, any more than a factory, railroad train or automobile on shore is immune from all danger of fire or accident. But since the chance of mishap does not differ substantially in kind or degree from that on land, the need for a special and different standard of discipline does not exist.

[38] Petitioner's contention (Br., pp. 15–16, 23) that in establishing the legality of a strike a distinction must be drawn between the "home port" of a ship and other ports in the United States is without any basis. While the statutes require each ship to have a "home port," which may be changed from time to time (Home Port Act of February 26, 1925, c. 235, Secs. 1–2, 46 U. S. C., §§ 18, 1012), the aim of this enactment "was to simplify the previous technical difficulties surrounding the determination of the proper place in which to record conveyances." *The Fort Orange*, 5 F. Supp. 833, 842 (D. C. S. D. N. Y.). The "home port" is like the state of incorporation. Indeed it may be a port which is never frequented by the ship. Hearing before the Committee on the Merchant Marine and Fisheries, House of Representatives, 68th Cong., 2d Sess., January 26, 1925, *Home Ports of Vessels of the United States*, pp. 16–17 (concerning vessels sailing the Pacific ocean whose home port was St. Paul, Minnesota). Cf. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409; *Southern Pacific Co.* v. *Kentucky*,

seeking to require the employer to accord them their rights under the law.[39]

In *Buddington* v. *Smith,* 13 Conn. 333, 335 (1839), the Supreme Court of Errors of Connecticut, in holding that a master had no right to imprison a seaman in port, declared:

> The mariners of a ship at sea are at a distance from all the ordinary restraints of government, and of course, must be subjected to other rules of discipline than those who are under more immediate accountability to law. The master, therefore, is invested with absolute authority; or, at least, a power as great as that of a master over his apprentice, or a parent over his child. His orders, when not unlawful, must be obeyed; and he has a right to compel submission to all reasonable requirements, by any punishment not unusual or dangerous; and of these punishments one of the most common

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222 U. S. 63, 67. No case or statute has ever indicated that labor had any different status in the ship's "home port" than in any other port.

[39] See Hearings Before the Committee on Merchant Marine and Fisheries, House of Representatives, 75th Cong., 1st Sess., on H. J. Res. 121 and H. J. Res. 143. Exhibit entitled "*Report on the status and Working Conditions of Seamen in the American Merchant Marine*," p. 192:

"The statutes relating to mutiny were designed to ensure obedience to the master's orders when the master must rely upon his own authority to enforce obedience and when disobedience may jeopardize the master's authority and imperil the safety of the ship. In a port of safety the master can obtain the assistance of civil authorities, the ship is not imperiled, and a strike by seamen is in consequence no different from a strike by any other class of workers."

> is confinement on ship-board. *The United States* v. *Smith,* 3 Wash. C. C. Rep. 523. *Michaelson* v. *Denison et al.,* 3 Day 294. 3 Kent's Com. 181. *The United States* v. *Freeman,* 4 Mason 412. The power is a high power, but seems to be absolutely necessary for the protection of the lives and property entrusted to the master of a vessel, while the mariners are removed from all ordinary restraints. But when the ship is in port, there is much less necessity for the exercise of this authority; and still less for the exercise of this authority on shore, especially in a civilized country. The master of a vessel is, and must be, the commander, on board; but on shore, he becomes weak as other men.

See, also, *The Blake, supra; The Condor,* 196 Fed., at 74.

Petitioner's assertion (Br. pp. 26–27) that to sustain the Board's position "will be jeopardizing the present and future safety of our country" ignores the realities of the situation. Already the shipowners and the various unions representing ship personnel, including the Union here involved, have entered into an industry-wide arbitration agreement for the settlement of all disputes during the emergency. The exercise of the right to strike or lock-out is unconditionally renounced by all parties for the duration of the war. A Maritime War Emergency Board has been set up, with a pledge that its decisions will

be accepted.[40] During the First World War a similar development took place and the unions carried out their end of the arrangement without a single strike.[41] The fact that Congress had given the seamen the status of free men by passing the Act of 1915 was used by the unions, when a shortage of seamen appeared imminent, in issuing calls to "all seafaring men ashore or afloat" "to prove that no enemy on the seas can stop the ships of the Nation whose seamen bear the responsibility of liberty."[42] In connection with the present war effort the Union here involved has already issued a call to former seamen who have taken land jobs to return to the sea to fill a

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[40] *Arbitration Agreement in Shipping Industry*, Labor Relations Reporter, vol. 9, No. 18, pp. 463–464 (December 29, 1941); *Maritime Arbitration*, Business Week, January 10, 1942, p. 69; The Trades Unionist, American Federation of Labor, Washington, D. C., January 17, 1942, p. 8.

[41] Proceedings of the Joint Shipping Industrial Conference, June 1919, p. 15; Report of the Director of Marine and Dock Industrial Relations Division, United States Shipping Board, *Marine and Dock Labor: Work, Wages, and Industrial Relations During the Period of the War* (1918), pp. 15–27, 37, 40, 45–47, 164; Maritime Labor Board, *Report to the President and to the Congress*, March 1, 1940, pp. 33–34; Hearings before the Senate Committee on Commerce, 74th Cong., 1st Sess., on S. 2582, A Bill to Develop a Strong American Merchant Marine, to Promote the Commerce of the United States, to Aid National Defense, and For Other Purposes, pp. 432–434.

[42] Hearings before the Senate Committee on Commerce, 74th Cong., 1st Sess., on S. 2582, p. 432.

growing shortage of sailors.[43] All government investigations dealing both with the experiences of the last war and conditions since point to the need for the development of "self-respecting equality" between employer and seamen rather than the "traditional disciplinary role" as a prerequisite for a stable and sound merchant marine."[44]

2. Even if, in a technical sense, the strikers' conduct were illegal, the strikers would not have forfeited their right to reinstatement under the National Labor Relations Act

This case arises under the National Labor Relations Act, not under the statute relating to revolt and mutiny. The mutiny statute is relevant only by way of justification for a refusal to reinstate which otherwise would plainly have been required under the Labor Relations Act.

It does not follow, however, that all conduct which is unlawful under some other statutory pro-

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[43] New York Times, January 10, 1942.

[44] Maritime Labor Board, *Report to the President and to the Congress*, March 1, 1940, pp. 26, 28–30; H. Doc. No. 392, 75th Cong., 2d Sess., U. S. Maritime Commission, *Economic Survey of the American Merchant Marine* (November 10, 1937), pp. 46–49; U. S. Maritime Commission, *Economic Survey of Coastwise and Intercoastal Shipping* (March 15, 1939), pp. 61–64; Federal Coordinator of Transportation, Section of Labor Relations, *Hours, Wages, and Working Conditions in Domestic Water Transportation* (September 1936), pp. 221–223; Testimony of Secretary of Labor Perkins, Hearings before the Committee on Commerce and the Committee on Education and Labor, U. S. Senate, 75th Cong., 3rd Sess., on S. 3078, pp. 974–975 (February 4, 1938).

vision affords an employer such justification. Both before and since the *Fansteel* decision it has been held repeatedly that technical or minor violations of law by employees on strike because of an unfair labor practice do not prevent the Board from ordering reinstatement. *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138, 146 (C. C. A. 9), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 888 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Stackpole Carbon Co.,* 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472, 479 (C. C. A. 3), certiorari denied on this point, 310 U. S. 655; *National Labor Relations Board* v. *Colten,* 105 F. (2d) 179, 183 (C. C. A. 6); see also *Stewart Die Casting Corp.* v. *National Labor Relations Board,* 114 F. (2d) 849, 855 (C. C. A. 7), certiorari denied, 312 U. S. 680; Note, *Employee Misconduct under the Wagner Act; Developments since the Fansteel Case,* 39 Col. L. Rev. 1369. Thus, in the *Reed & Prince* case, the court declared that the *Fansteel* decision "is not applicable to bar a Board order reinstating employees guilty of minor breaches of peace on the picket line" (118 F. (2d), at 888).

Since both major and minor offenses are unlawful, these cases indicate that the fact that an employee has violated a law does not in itself always bar reinstatement. The proper criterion for differentiation is, we submit, to be found in the Labor Relations Act itself. That act authorizes the Board to order "such affirmative action, including reinstatement of employees * * *, as will effectuate the policies of this Act" (Section 10 (c)). The policy of the Act is to preserve industrial peace by preventing employers from interfering with the choice of representatives by employees or from refusing to bargain collectively. It is not the purpose of the Act, of course, to protect employees who violate other laws, whether the violation be petty or gross. Cf. *National Labor Relations Board* v. *Federal Bearings Co.*, 109 F. (2d) 945 (C. C. A. 2).

But it would not be consistent with the policy of the Act for employers who provoke their workmen to strike by unfair labor practices to escape the normal consequences of their conduct because the employees committed those minor offenses which all employers know frequently accompany strikes. We believe this to be the rationale of the cases cited. In the *Republic Steel* case the Circuit Court of Appeals declared (107 F. (2d), at 479):

In the *Fansteel* case the court was dealing with a case which involved a sit-down strike in which the strikers forcibly and unlawfully deprived their employer of possession of his plant. The court made it clear that unlawful conduct of that character deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act, 29 U. S. C. A., § 163, that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory. We accordingly recently held that it was not intended by the Act that minor disorders of this nature should deprive a striker of the possibility of reinstatement. *National Labor Relations Board* v. *Stackpole Carbon Co.*, supra.

The court there held that strikers who had been convicted of offenses which would not normally accompany a strike, such as discharging firearms, carrying concealed weapons, obstructing railroad tracks and telephone messages, malicious destruction of property, and serious assault and battery should not be reinstated but that (p. 480):

> As to the remaining offenses proved to have been committed we are satisfied from their character and from the small penalties imposed that they were all sufficiently minor to come within our decision in the *Stackpole* case and the order of the Board directing the reinstatement of the persons involved in them will be enforced.

In the instant case, as we have shown (*supra*, pp. 25, 52), the conduct of the strikers was probably not unlawful at all. But even if the refusal to obey orders which, of course, occurs in every strike, should be deemed unlawful under the mutiny statute, the violation would be at most a technical one. Indeed, the penalties imposed in cases of mere refusal to work by seamen, even when the vessel was not tied up safely in an American port, show that violations of the mutiny law in such circumstances are not regarded as more serious than minor breaches of the peace.[45]

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[45] The penalties disclosed in reported cases dealing with peaceful cessation of work, whether in American or foreign harbors, were as follows:

United States v. *Lynch*, 26 Fed. Cas. No. 15,648 (C. C. S. D. N. Y.) (N. Y., 60 days plus $1); *United States* v. *Nye*, 27

In this case the conduct of the employees was provoked and caused by petitioner's unlawful refusal to bargain. Petitioner's persistent refusal to acknowledge communications from or to see or speak to the chosen representative made a strike neither unlikely nor unreasonable. The strikers did not engage even in the minor disorders referred to in the cases cited (*supra*, p. 53). There was only the refusal to work, of which a strike, by definition, necessarily consists. The reinstatement of strikers who sought only to force the employer to bargain collectively and thus comply with the Labor Relations Act in such circumstances obviously serves to effectuate the policies of that Act.

Even if the mere act of striking might be deemed to violate some other law, the nature of the offense should be weighed in relation to the nature of the rights guaranteed by the Labor Relations Act. Where, as here, there is doubt as to whether the mutiny statute has been violated at all, and where the violation, if any, would be relatively trivial, and of no greater consequence than a breach of the peace, the policy of the Labor Relations Act rather than of the mutiny act should prevail.

Fed. Cas. No. 15,906 (C. C. D. Mass. 1855) (Boston, 30 days); *United States* v. *Seagrist*, 27 Fed. Cas. No. 16,245 (C. C. S. D. N. Y. 1860) (Palermo, Sicily, 30 days plus $10); *Hamilton* v. *United States*, 268 Fed. 15 (C. C. A. 4, 1920) certiorari denied, 254 U. S. 645 (Bermuda, 2 days plus $50); *Rees* v. *United States*, 95 F. (2d) 784 (C. C. A. 4, 1938) (Montevideo, 2 months or $50); *United States* v. *Albers*, 115 F. (2d) 833 (C. C. A. 2, 1940) (Ceylon, up to 3 months).

This does not mean that the seamen's conduct, should it be deemed to violate the mutiny act, need go unpunished. If the prosecuting officials of the Government are of opinion that that statute has been violated, they may institute proceedings, just as state officials have power to punish disorderly picketers for breach of the peace, independent of anything the Labor Board may order. But the employer, who had illegally provoked the conduct, should be required to remedy, by reinstatement, the wrong which led to the trouble.

For these reasons we suggest that it is unnecessary for this Court to determine whether or not the strikers' conduct here violated the provisions of the laws against mutiny and revolt. For even if it did, the National Labor Relations Board had power to order the strikers reinstated.

C. THE SO-CALLED BREACH OF SHIPPING ARTICLES CONSTITUTED NO VALID GROUND FOR THE DISCHARGES

Petitioner further maintains (Br., pp. 3, 6–8, 9–27, 34) that the seamen of the *City of Fort Worth* did not have the right to strike at Houston because at the time they were serving under shipping articles which provided that—

> * * * the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master * * * in everything relat-

> ing to the vessel * * * whether on board, in boats, or on shore; (R. 681).

The articles, which are in a form prescribed by law (46 U. S. C., Sec. 564), do not contain an explicit agreement not to strike. The agreement to be obedient to the directions of superiors is of course implicit in every employment relationship. The articles merely make explicit that implicit obligation. As both the Board (R. 31) and the court below (R. 778–780) held, all strikes necessarily involve disobedience to this implied agreement. But under the Act such disobedience cannot justify a discharge; not only is the right to strike guaranteed to employees by the provision in Section 7 that "employees shall have the right * * * to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," but even more specifically, Section 2 (3) provides that employees who cease work in connection with a current labor dispute or because of unfair labor practices shall continue to be employees. It is a necessary corollary that the breach of the employment contract involved in striking does not protect an employer in discharging an employee. *National Labor Relations Board* v. *Mackay Radio & Tel. Corp.*, 304 U. S. 333, 346.

Furthermore, here the employees ceased work because of the employer's unfair labor practices, and it is well established that the Board may order

reinstatement of persons who strike in such circumstances regardless of whether there may be a technical breach of the employment contract. See cases cited *supra*, p. 19.

The instant situation is to be distinguished from that presented by an agreement not to strike, validly entered into by a *bona fide* labor organization as a result of collective bargaining. Whether breach of such a collective obligation permits discharge need not be determined here. Shipping articles are individual contracts (*Oliver* v. *Alexander*, 6 Pet. 143; *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411, 414 (C. C. A. 5), certiorari denied, 305 U. S. 653) and cannot lawfully be construed to include a renunciation of the right to strike. Cf. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 360–361; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 66–67 (C. C. A. 2), affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2); *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992, 994–995 (C. C. A. 2).

That shipping articles are not to be construed as a limitation upon the right to strike is shown by *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 210–212, in which this Court indicated that the articles were intended to give employees who go to sea added

protections, not to deprive them of the rights and incidents of employment normal to that relationship on land.

Finally, even if the conduct of the seamen were to be adjudged solely on the basis of strict contract law, petitioner is not aided by the fact that the strike may have constituted a technical breach of contract. For petitioner waived the breach by continuing after the strike to receive the services of the seamen. Although the master of the ship and petitioner's local shipping agent in Houston were authorized by petitioner to discharge and replace the crew at Houston (R. 569–573, 644, 481–482), they did not do so, but allowed the men to return to their former positions and to continue in the employ of petitioner for seven days before the men were discharged (R. 295–297, 299–300, 375–377, 388, 502). An employer who "has cause justifying * * * discharge" but who "nevertheless continues, with knowledge of the facts, to receive the benefit of the servant's service * * * cannot afterwards make the breach ground for discharge." 3 Williston, *Contracts,* Rev. Ed., § 725, p. 2062; cf. *National Labor Relations Board* v. *Federal Bearings Co.,* 109 F. (2d) 945 (C. C. A. 2).

II

THE BOARD'S FINDING THAT THE EMPLOYMENT RELATIONSHIP CONTINUED AFTER THE SIGNING OFF OF SHIPPING ARTICLES IS SUPPORTED BY SUBSTANTIAL EVIDENCE; IN ANY EVENT PETITIONER DISCRIMINATED AGAINST THE MEN BY FAILING TO REHIRE THEM

Petitioner urges (Br., pp. 27–32) that the tenure of employment of the seamen of the *City of Fort Worth* automatically terminated when they signed off shipping articles at the conclusion of the voyage at Philadelphia, and hence that petitioner did not then discharge them in violation of the Act. The Board, however, found that "the tenure of employment of the [petitioner's] seamen is not terminated by the mere expiration of shipping articles" (R. 27–28), and the court below sustained the finding (R. 773–774). The evidence amply sustains the concurrent holdings of the Board and lower court upon this issue of fact. Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461.

The five men here involved had worked continuously for petitioner without regard for the expiration of articles; although each round-trip voyage of the *City of Fort Worth* took about 25 days (R. 413–414, 213, 278), the men had been in petitioner's employ for periods ranging from 6 weeks to 18 months (R. 124–125, 177–178, 196–197, 213, 278). According to petitioner's custom, its

seamen ordinarily signed new articles when signing off the old, but even when they did not, they nevertheless considered themselves engaged for the next voyage unless expressly notified to the contrary (R. 153–154, 184–185, 199–201, 221–223, 300–301). Indeed, petitioner encouraged continuous employment by the payment of a bonus to each employee who completed a year of work (R. 185). Finally, petitioner's officers all referred to the men as having been "discharged" or "fired" upon the arrival of the vessel at Philadelphia because of their strike activity (R. 201–202, 224–225, 284, 338, 390–391, 394, 461–462, 491–492, 515), thus implicitly recognizing, as "maritime people generally" have, that the "seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles." *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 218; cf. *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, 313 U. S. 582.

This Court's decision in the *Waterman* case is directly in point. The differences in the evidence upon which petitioner relies are matters of detail and not of substance.

But in any event, petitioner's contention, even if true, is completely immaterial. For if the employment relation did terminate by the signing off of articles, petitioner's discriminatory refusal to

rehire the men because of their union activity was, as the Board found in the alternative (R. 28n), equally an unfair labor practice under Section 8 (3) and (1) of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177.

III

PETITIONER WAS NOT IMPROPERLY EXCLUDED FROM THE BALLOTING FOR COLLECTIVE BARGAINING REPRESENTATIVES; IN ANY EVENT PETITIONER'S REFUSAL TO BARGAIN VIOLATED SECTION 8 (1) AND (5) OF THE ACT

Petitioner challenges (Br., pp. 32–33) the certification of the Union as exclusive representative, and the consequent finding of refusal to bargain, on the ground that the Board refused to permit employer representatives to be present at the balloting conducted on one of its seven ships (see pp. 3–4, *supra*).

The court below (R. 770–771) held that in excluding petitioner's representatives, the Board acted within its discretionary power to govern the conduct of elections. This ruling, which is in accord with the only other decision directly in point (*Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586 (C. C. A. 2), certiorari denied, 313 U. S. 594), is clearly correct. While the presence of employer representatives may be helpful to Board representatives who conduct the election in their duty to determine the eligibility of the voters, the presence of company

representatives may have the effect, though perhaps unintended, of inhibiting the employees so that the election results do not reflect the free and independent choice contemplated by the Act.[46] Accordingly, as a general rule the Board has not allowed employer representatives to be present at the polls unless the labor organization involved consents. *Third Annual Report of the National Labor Relations Board* (1938), p. 147.[47]

The decisions of this Court recognize that the Board has wide discretion in determining the steps necessary to insure a fair election. "The control of the election proceeding and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; see also *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458.

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[46] As the court below stated: "* * * it [the Board] may take the view, as it evidently did in this instance, that since the presence of such representatives, unless consented to, might operate in some degree to coerce the employees and prevent them from expressing their free choice, some other means of identifying voters should be employed. The Act confers no right upon the employer to have its representatives present, and it is obvious that their presence is not essential to a fair election" (R. 770–771).

[47] Employer representatives were not permitted to be present at elections conducted by the old National Labor Board which administered section 7 (a) of the National Industrial Recovery Act. Lorwin & Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 159–161.

The Railway Labor Act, upon which the National Labor Relations Act is modelled[48] specifically provides that the National Mediation Board shall hold its elections "in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." Sec. 2 (9), 48 Stat. 1185 (45 U. S. C., Sec. 152 (Ninth)). It has been the uniform practice under that statute not to permit the representatives of employers to be present at elections.[49]

This result is consistent with, if not compelled by, the basic theory of both the Railway Labor Act and the National Labor Relations Act. Employees are to select their own collective bargaining representatives, without interference by the employer. Just as employees have no right to be represented when the stockholders of a company elect directors or directors choose personnel officers, so it is none of the employer's business whom the employees choose to represent them. Cf. *National Labor Relations Board* v. *Jones Foundry & Machine Co.*, 123 F. (2d) 552, 555 (C. C. A. 7). Since the employer has no legitimate interest in the

[48] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 524–525.

[49] National Mediation Board, First Annual Report, (1935), p. 4. The National Mediation Board has informed the Department of Justice that its practice is not to permit employer representatives to be present at elections.

result of the election, he has no legal standing to be represented at the election.

Moreover, petitioner has not suggested and cannot suggest any way in which the presence of its representative would have affected the final result of the election.[50] The absence of an observer, or of the correct observer, for one of the contesting labor organizations has been held to be immaterial under the Railway Labor Act in the absence of a showing that the election was not honestly and fairly conducted. *Virginian Ry. Co.* v. *System Federation No. 40,* 11 F. Supp. 621, 628, affirmed, 84 F. (2d) 641, affirmed, 300 U. S. 515; *National Federation of Railway Workers* v. *National Mediation Board,* 110 F. (2d) 529, 534–535 (App. D. C.), certiorari denied, 310 U. S. 628. Even where statutes require that election officers be appointed in a certain way or be divided between opposing parties, an election is not invalidated if the statute is not complied with as long as the result of the election is not shown to be affected. *Choisser* v. *York,* 211 Ill. 56, 71 N. E. 940; *Gilleland* v. *Schuyler,* 9 Kan. 569; *People* v.

[50] Any influence which the presence of its representative might have had upon the election would have been in violation of the Act. When, during the oral argument (Tr. pp. 4–5), counsel for petitioner was asked by the Chairman of the Board whether he claimed "that there was anything wrong about the election or about the counting of the ballots," he replied only that he stood on his "objection to the exclusion of any representative from this election for the purpose of identifying voters or of observing the election."

Cook, 8 N. Y. 67, 59 Am. Dec. 451; *Ward* v. *Kropf,* 120 N. Y. Supp. 476; *Hawthorne* v. *State,* 116 Ala. 489, 22 So. 894; *Sanders* v. *Lacks,* 142 Mo. 255, 43 S. W. 653; *State ex rel. McMillan* v. *Sadler,* 25 Nev. 131, 58 Pac. 284; *Carabajal* v. *Lucero,* 22 N. Mex. 30, 158 Pac. 1088; *Dial* v. *Hollandsworth* 39 W. Va. 1, 19 S. E. 557. See 1 A. L. R. 1535, 1536.[51]

Petitioner's theory seems to be that the Board's failure to permit its observer to be present at the election invalidated the certification, and that in the absence of a valid certification petitioner was not obligated to bargain. But under the statute an employer must bargain with the representative chosen by the majority of his employers irrespective of whether any certification has been issued. E. g., *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318. Petitioner has never suggested that the union has not represented a majority of the employees.[52]

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[51] For example, in *Carabajal* v. *Lucero, supra,* an election was not set aside, although all three judges, in violation of statute, were members of the same political party.

[52] We do not read the stipulation (R. 114), in which the parties agreed that the validity of the certification depended upon the validity of the Board's ruling as to the exclusion of company representatives from the election, as challenging the fact that the union actually did obtain the majority of the votes cast in the election. See Note 50, *supra,* p. 67.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

1

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

2

Sections 1 and 2 of the Act of March 3, 1835, c. 40, 4 Stat. 775–776, as reenacted in Sections 292 and 293 of the Criminal Code, 35 Stat. 1146 and now contained in 18 U. S. C. §§ 483 and 484, read as follows:

SEC. 483. INCITING REVOLT OR MUTINY ON SHIPBOARD.

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their

proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than $1,000, or imprisoned not more than five years or both.

SEC. 484. REVOLT OR MUTINY ON SHIPBOARD.

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than $2,000 and imprisoned not more than ten years.

3

Section 51 of the Act of June 7, 1872, c. 322, 17 Stat. 262, 273–274, as reenacted in the Revised Statutes in 1878, Section 4596, reads as follows:

Whenever any seaman who has been lawfully engaged, or any apprentice to the sea-service, commits any of the following offenses, he shall be punishable as follows:

First. For desertion, by imprisonment for not more than three months, and by forfeiture of all or any part of the clothes or effects he leaves on board, and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting and refusing, without reasonable cause, to join his vessel, or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage; or for absence at any time without leave, and without sufficient reason, from his vessel, or from his duty, not amounting to desertion, or not treated as such by the master; by imprisonment for not more than one month, and also, at the discretion of the court, by forfeiture of his wages, of not more than two days' pay, and, for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave after her arrival at her port of delivery, and before she is placed in security, by forfeiture out of his wages of not more than one month's pay.

Fourth. For willful disobedience to any lawful commands, by imprisonment for not more than two months, and also, at the discretion of the court, by forfeiture out of his wages of not more than four days' pay.

Fifth. For continued willful disobedience to lawful commands, or continued willful neglect of duty, by imprisonment for not more than six months, and also, at the discretion of the court, by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of either a sum not more than twelve days' pay, or sufficient to defray any expenses which have been properly incurred in hiring a substitute.

Sixth. For assaulting any master or mate, by imprisonment for not more than two years.

Seventh. For combining with any others of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the vessel, or the progress of the voyage, by imprisonment for not more than twelve months.

Eighth. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages, of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months.

Ninth. For any act of smuggling of which he is convicted, and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage; and the whole or any part of his wages may be retained in satisfaction or on account of such liability; and he shall also be liable to imprisonment for a period of not more than twelve months.

4

Section 4596 of the Revised Statutes, as amended by Section 19 of the Act of December 21, 1898, c. 28, 30 Stat. 755, 760, reads as follows:

SEC. 4596. The words "domestic trade" in this section shall include trade between ports of the United States and trade between ports of the United States and the Dominion of Canada, Newfoundland, the West Indies, and Mexico. The words "for-

eign trade" shall include trade between ports of the United States and foreign ports, except as above specified, and trade between Atlantic and Pacific ports of the United States. Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses he shall be punishable as follows:

First. For desertion, if the offense occur at a port of the United States, or a foreign port in the domestic trade, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned. If the offense occur at a foreign port in the foreign trade, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned; and also, at the discretion of the court, by imprisonment for not more than one month.

Second. For neglecting or refusing, without reasonable cause, to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of any voyage, or for absence at any time without leave and without sufficient reason from his vessel or from his duty, not amounting to desertion or not treated as such by the master, if the offense occur at a port of the United States or a foreign port in the domestic trade, by a forfeiture from his wages of not more than two days' pay, or sufficient to defray any expenses which have been properly incurred in hiring a substitute;

or if the offense occur at a foreign port, in the foreign trade, by a forfeiture from his wages of not more than two days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Third. For quitting the vessel, in whatever trade engaged, at a foreign or domestic port, without leave after her arrival at her port of delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay.

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port, if of the United States, by forfeiture from his wages of not more than four days' pay, or upon arrival in a foreign port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port, if of the United States, by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of either a sum of not more than twelve days' pay or sufficient to defray any expenses which have been properly incurred in hiring a substitute, or upon arrival in a foreign port, in addition to the above penalty, by imprisonment for not more than three months, at the discretion of the court.

Sixth. For assaulting any master or mate, in whatever trade engaged, by imprisonment for not more than two years.

Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, in whatever trade engaged, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months.

Eighth. For any act of smuggling for which he is convicted, and whereby loss or damage is occasioned to the master or owner, in whatever trade engaged, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage; and the whole or any part of his wages may be retained in satisfaction or on account of such liability; and he shall be liable to imprisonment for a period of not more than twelve months.

5

Section 4596 of the Revised Statutes, as amended by Section 7 of the Act of March 4, 1915, c. 153, 38 Stat. 1164, 1166–1167, and as now contained, with subsequent immaterial amendments, in 46 U. S. C. Sec. 701, reads as follows:

VARIOUS OFFENSES; PENALTIES

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay.

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court.

Sixth. For assaulting any master, mate, pilot, engineer, or staff officer, by imprisonment for not more than two years.

Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months.

Eighth. For any act of smuggling for which he is convicted and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage, and the whole or any part of his wages may be retained in satisfaction or on account of such liability, and he shall be liable to imprisonment for a period of not more than twelve months.

6

Section 20 of the Clayton Act of October 15, 1914, 38 Stat. 730, 738, 29 U. S. C. § 52, reads as follows:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application,

for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

7

Section 1002 of the Merchant Marine Act, 1936, as added by the Act of June 23, 1938, sec. 45, c.

600, 52 Stat. 965, 46 U. S. C. § 1252,[53] reads as follows:

> SEC. 1002. The provisions of this title shall not in any manner affect or be construed to limit the provisions of the National Labor Relations Act, nor shall any of the unfair labor practices listed therein be considered a dispute for the purposes of this title. Questions concerning the representation of employees of a maritime employer shall be considered and determined by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act: *Provided, however,* That nothing in this title shall constitute a repeal or otherwise affect the enforcement of any of the navigation laws of the United States or any other laws relating to seamen.

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[53] This Act originally was to expire in 3 years on June 23, 1941 (Sec. 1012). Some sections including Sec. 1002 were extended until June 23, 1942. Public No. 124, 77th Cong., 1st Sess.

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